federal title. Consequently, unless the states are expressly authorized to tax, possession alone by the United States should remove interstate commerce from local taxation.[16]

On the other hand, the federal government's ownership of lands within the states does not *ipso facto* withdraw such property from the local police power.[17] It seems to be the rule that the police power persists until the state cedes its jurisdiction to the central government.[18] This power of police, however, is brought to bear only on private persons; it seems never to have circumscribed the power of the United States. As in the case of interstate commerce privately carried on, the state has police powers incidental to its territorial jurisdiction. When these powers reach the point of interfering with the *means* used by the United States to attain the ends of its government, they cease.[19] When the United States elects to operate the agencies necessary to obtain these ends with its own hands, it is arguable that the property taken over becomes more of a *means* of governmental operation than it was under private control. At all events, local regulation of the property now becomes a direct interference with the governmental operation of the United States, whereas before the interference was only indirect. This is as incompatible with the supremacy of the federal government within its sphere as is taxation of its property.[20] To require a sovereign to fence his right of way or to forbid him to carry freight on Sunday is to impose a restraint as inconsistent with his character as a tax on his assets within a given radius. This leads to the conclusion that the states cannot, without the express consent of Congress, tax or regulate property in the possession of the United States when engaged in interstate commerce.

RIGHT OF PUBLIC SERVICE COMPANY OR STATE COMMISSION TO ALTER RATES FIXED BY CONTRACT. — II. The recent unprecedented increase in the costs of labor, materials, and capital has brought before the public utilities of the country the difficult legal question whether they may lawfully increase the prevailing low utility rates above a maximum fixed in unexpired long-term rate contracts with their patrons,[1] or in municipal franchises under which they are oper-

[16] But see Henry Hall, "Federal Control of Railways," 31 HARV. L. REV. 860, 867. The writer seems not to distinguish between taxation of instrumentalities of the federal government which are private persons, and taxation of private property operated by and in the possession of the federal authorities. In either case he thinks express exemption from state taxation necessary.

[17] United States *v.* Sutton *et al.*, 165 Fed. 253 (1908). See 22 HARV. L. REV. 456.

[18] See FREUND, POLICE POWER, § 85. See also 31 HARV. L. REV. 1164.

[19] M'Cullough *v.* Maryland, *supra*.

[20] The United States Supreme Court has upheld the imposition of internal revenue taxes on a state engaged in the liquor business on the grounds that this was not a governmental function and that state socialism should not be permitted to deprive the United States of its sources of income. South Carolina *v.* United States, 199 U. S. 437 (1905). These arguments will probably not prove so persuasive when the shoe is on the other foot. See 1 WILLOUGHBY ON THE CONSTITUTION, § 59; 19 HARV. L. REV. 286.

[1] Discussed in 32 HARV. L. REV. 74.

ating, so that the increased rates, reasonable under the new conditions, should apply equally to all members of the public receiving a like or substantially similar service.

In some states the law permitted the public utility proprietor to establish the increased rates, subject to the common-law power of the courts to pass upon their reasonableness,[2] or subject to regulation by a statutory public service commission empowered to declare reasonable rates;[3] but in the majority of states which have enacted modern public utility statutes no change in rates may be made by the utility without first obtaining an order of the state public service commission authorizing the new rate.[4]

A mass of litigation ensued upon this question before the state commissions and in the state courts, and the problem has recently been presented to the United States Supreme Court in a number of cases, many of which are still pending. Among those decided two especially deserve notice.

The first, *Union Dry Goods Company* v. *Georgia Public Service Corporation*,[5] involved the legality of an order of a state commission, declaring certain increased rates for electric light and power to be reasonable and requiring the utility to enforce them, as applied to a patron who held an unexpired long-term rate contract fixing a lower maximum charge for the service. This contract had been made, however, subsequently to the effective date of the act creating the commission and empowering it to regulate such utilities. The decision of the Supreme Court of Georgia,[6] upholding the order of the commission and denying specific performance of the contract, was affirmed by the United States Supreme Court on the ground that the regulation of public utility rates is a lawful exercise of the police power of the state not subject to control by any person or persons by contract or otherwise. *A fortiori*, where made while the regulating act was in force,[7] such contract is not within the protec-

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[2] See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1406.

[3] Leiper *v.* Balt. & Phila. R. Co., 262 Pa. St. 328, 105 Atl. 551 (1918); Cincinnati *v.* The Public Utilities Com., 96 Ohio St. 270, 276, 117 N. E. 381 (1917). See 32 HARV. L. REV. 74. Under some state public utility acts, as under the federal Interstate Commerce Act, it is held that while the utility may initiate an original schedule of rates, increased rates may not be put into effect without the approval of the commission. State Public Utilities Com. *v.* Chicago & West Towns Ry. Co., 275 Ill. 555, 114 N. E. 325 (1916). Advances in Rates — Western Case, 20 I. C. C. R. 307 (1911).

[4] Manitowoc *v.* Manitowoc & Northern Traction Co., 145 Wis. 13, 28, 129 N. W. 925 (1911); Sultan Timber Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320 (1910). In a number of states such permission is expressly required by the public service statute, and in at least one state, even as to rates in existence prior to the date when the act became effective. Washington Public Service Commission Law, 1911, § 34 (GEN. STAT. 1915, §§ 8626–34). See 32 HARV. L. REV. 74, 77, note 11.

[5] 248 U. S. 372 (1919).

[6] 142 Ga. 841 (1914).

[7] In V. & S. Bottle Co. *v.* Mountain Gas Co., 261 Pa. St. 523, 104 Atl. 667 (1918), discussed in 32 HARV. L. REV. 74, the contract was made prior to the effective date of the Public Service Act, and although treated by the court as valid when made, was held to have become inoperative and void when that statute went into effect, since by reason of the fixed rate it contravened the provisions of the act against discrimination. It would seem that the same principles are involved irrespective of whether the contract is entered into before or after the regulating act is in force.

tion of the contract clause,[8] or the Fourteenth Amendment[9] of the Federal Constitution.

In the second case, *Columbus Railway, Power & Light Co.* v. *City of Columbus*,[10] the utility not being able under present-day conditions to make a fair return on its investment [11] at the rates fixed by the unexpired long-term franchise which it had accepted as a condition of its right to operate within the municipality, and having in vain sought the city's consent to increased rates, declared that it surrendered the franchise, raised its rates, and brought suit to enjoin the continued enforcement of the street railway franchise ordinances fixing rates. The ground taken was that these ordinances constituted a deprivation of its property without due process of law. The United States Supreme Court, in affirming the decree of the federal district court dismissing the bill,[12] held that as the Supreme Court of Ohio had construed the state statute [13] to expressly confer upon the municipality the power of making binding contracts of that character, both the city and the utility became bound thereby for the franchise period;[14] that the utility was not excused from the obligation of rendering service at the fixed rate by the unprecedented increase in costs, nor by the fact that the federal government through the National War Labor Board had greatly increased the wage scale, where the utility was still solvent, and, taking the franchise term as a whole, was unable to show that the contract would prove unremu-

[8] "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ." Art. I, § 10, U. S. Constitution.

[9] "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, Amendments U. S. Constitution.

[10] 249 U. S. 399 (1919).

[11] Smyth *v.* Ames, 169 U. S. 466 (1898), upheld the right of a public utility to earn a fair return on its investment.

[12] 253 Fed. 499 (1918).

[13] PAGE AND ADAMS, OHIO GEN'L CODE, §§ 3768, 3771.

[14] Citing Interurban Ry. & Terminal Co. *v.* Public Utilities Com., 98 Ohio St. 287, 120 N. E. 831 (1918). In support of this interpretation of the Ohio statute the United States Supreme Court also referred to Cleveland *v.* Cleveland City Ry. Co., 194 U. S. 517 (1904), which construed similar Ohio statutes to have authorized the municipality to enter into binding contracts with a public utility company fixing rates for a definite period, and, therefore, the city could not subsequently reduce said rates within said term without violating the constitutional prohibition against the impairment of the obligation of contracts. To the same effect: Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496 (1907); also see Detroit *v.* Detroit St. Ry. Co., 184 U. S. 368 (1902); Georgia Ry. & Power Co. *v.* R. Com. of Georgia (Ga.), 98 S. E. 696 (1919); Milwaukee Electric Ry. & Light Co. *v.* Railroad Com., 238 U. S. 174 (1915); Home Tel. & Tel. Co. *v.* City of Los Angeles, 211 U. S. 265 (1908).

On the other hand, it has been held that a statute empowering the municipality to contract with public utilities for the privilege of operating therein, so far as authorizing the regulation of rates and service, is a delegation of the police power which the city has no right to contract away. City of Chicago *v.* O'Connell, 278 Ill. 591, 116 N. E. 210 (1917). In Portland *v.* Public Service Com., 89 Ore. 325, 173 Pac. 1178 (1918), the order of the State Public Service Commission increasing rates above the maximum specified in a street railway franchise was upheld upon the ground that the state, having exercised its police power in granting the franchise through the city as its agent, could withdraw that authority and vest it in the Public Service Commission, which as the state's representative in the exercise of said power could agree with the utility company to such a change in the contract without violating any constitutional rights of the city or its inhabitants. *Acc.* Robertson *v.* Wilmington & Pa. Traction Co., 104 Atl. (Del.) 839 (1918).

nerative. Having contracted, it must bear the loss, even though "it may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates."[15]

The chief distinction in the facts of the two cases is that in the Union Dry Goods case the increased rates were approved and put into effect by order of the state commission, while in the Columbus case the increase was made by the utility without any commission action;[16] and, further, the former had to do with a contract between a public utility and its patrons, the latter with a municipal franchise granted to and accepted by a public utility.[17]

The court in the Columbus case quite properly treated the franchise fixing rates on the same basis as any public service rate-contract, for, as the Supreme Court of Pennsylvania well said recently, "There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate, nor is there any difference in principle between a contract with a borough, a corporation, or with an individual." [18]

The *ratio decidendi* of the Columbus decision is not based upon the procedural rule that in general the United States Supreme Court adopts the prior interpretations of state statutes by the highest court of the state,[19] nor on the line of precedents represented by the Vicksburg case cited,[20] both of which merely establish the power of this municipality to enter into such a contract, but rather upon general principles of the law of private contracts relating to impossibility as an excuse for non-performance, thus completely ignoring the public service character of the subject matter of said contract.

In the Union Dry Goods case we have state action increasing the rates, and the court meets the constitutional objections by falling

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[15] 249 U. S. 399, 414 (1919).

[16] The Ohio Public Utilities Commission Act (1913) (PAGE AND ADAMS, OHIO GEN'L CODE, §§ 614–616 *et seq.*) does not require prior consent of the commission to the establishment of increased rates by a public utility.

It should be noted in passing that where the utility proprietor increases rates above the maximum fixed by contract with a patron, no constitutional question is raised, but simply whether there has been a breach of contract which the law will redress; whereas, when the rate is thus increased by state action the question is whether that constitutes a violation of the federal or state constitutions against the impairment of obligations of contracts, and the taking of private property without due process of law. United States *v.* Stanley (Civil Rights Cases), 108 U. S. 3 (1883).

[17] In general, a franchise is treated as a contract and within the protection of the contract clause of the U. S. Constitution. Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518 (1819).

That the state may withdraw the power of regulation of the charges and service of public utilities from the municipality and transfer that authority to a state commission, since a grant of governmental or political authority by the state to cities, counties, and the like, does not constitute a contract within the meaning of the Federal Constitution. Pawhuska *v.* Pawhuska Oil and Gas Co., 250 U. S. 394, 39 Sup. Ct. Rep. 526 (1919).

[18] Leiper *v.* Baltimore & Philadelphia R. Co., 262 Pa. St. 328, 334, 105 Atl. 551 (1918).

[19] See 2 FOSTER, FEDERAL PRACTICE, 5 ed., 1573; HUGHES, FEDERAL PROCEDURE, 2 ed., 13.

[20] Vicksburg *v.* Vicksburg Waterworks Co., 206 U. S. 496, 508 (1907).

back upon the doctrine of the police power in the sense of that great unclassified residuum of the sovereign power of the state to promote the general welfare of its citizens.[21] Although the weight of authority in the state courts has resorted to the same plausible reasoning to avoid the constitutional difficulties of the question, it is submitted that this is not only unnecessary in order to reach the obviously just result in sustaining such state action, but it is an evasion of the realities of the situation, and imposes an unwarranted limitation on the functioning of a well-recognized branch of the law directly applicable to this subject, — the law of public utilities.

The very nature of the subject matter with which it deals demands that the law of public utilities be a living law. No field of human activity is more directly influenced by the progress of science and invention, and by the economic and social conditions of the day. It is, and must continue, flexible and elastic enough to protect the public necessity as developed by the actual situation prevailing at that time and place.

Especially with regard to the service to be rendered, and the rates to be charged therefor by those engaged in public service enterprises, it is impossible in the nature of things to attain that just regulation essential to the ultimate protection of the public interest by the application of rigid rules based on dogmatic, presupposed principles, or by adherence to the iron-bound doctrine of *stare decisis*. In short, the reasonableness of public utility rates must be determined by the facts as they exist when it is sought to put such rates into operation, or when established rates are challenged.[22]

The common law in the experience of ages learned this truth, and formulated practical, flexible legal standards, automatically adjusting themselves to the realities of the situation by requiring from public utilities reasonable service at reasonable rates under the circumstances,[23] — the question of reasonableness being a relative matter of time, place, and character of the undertaking.[24]

It must follow, therefore, that when a public utility rate ceases to be reasonable under actual conditions then and there existing it *ipso facto* becomes unlawful, as either too high and extortionate, or too low and endangering the maintenance of a reasonably adequate service to meet the public necessity.[25] Under these circumstances it becomes

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[21] JAMES BRADLEY THAYER, LEGAL ESSAYS, 27.

[22] Smyth *v.* Ames, 171 U. S. 361 (1898) (second case).

[23] See address, "Administrative Application of Legal Standards," by Roscoe Pound, before the Public Utility Law Section of the American Bar Association, Boston, Massachusetts, September 2, 1919.

[24] Cumberland Tel. & Tel. Co. *v.* Kelly, 160 Fed. 316 (1908).

[25] "What was lawful in 1897 was just and reasonable rates and practices. . . . We must assume that the rates and practices then fixed were at the time just and reasonable. But it can hardly be that with changing circumstances those rates and practices would forever remain just and reasonable. We are admonished by present-day conditions that the higher level of prices and wages may have made old rates unreasonably low. . . . And if the rates become unreasonable and the practices unjust, they would cease to be lawful. Unchangeable rates and practices are almost certain to become unlawful. The legislature did not in this respect change the law by the Public Utilities Act of 1911. That act only authorizes just and reasonable rates and practices. It puts into statutory form what was in 1897 and always has been lawful." Per Swayze, J., in Atlantic

the legal duty of the utility itself, or of the state commission, to raise or lower the rates so that they are again reasonable, and as such applicable to all members of the public receiving a like or substantially similar service.[26] Although the law of public utilities recognizes the right of the utility to establish reasonable rate differentials corresponding to a real difference in the service rendered,[27] that is of no avail here, for the service to the contract patron and non-contract patron is the same, and there can be no legal justification for a more favorable rate to the contract patron.

In substance, then, the long-term rate contract or franchise between the public utility proprietor and the patron, irrespective of whether that patron is a municipality or a person, is simply an attempt to subject to contractual control a subject which is peculiarly a matter of law as affected by overpowering external influences, which in the nature of things cannot be bound down to *a priori* agreements or enactments.[28] To enforce these long-term fixed rates under the changed conditions of the present day would result in the anomaly of the law defeating the law.

It is submitted that the solution of this problem, applicable to both cases discussed and supporting the legal right to increase the rates in each, is to be found in the well-recognized legal category of the law of public utilities; that the very nature of the subject matter of these long-term rate contracts and franchises, and the necessary operation of the common-law standards requiring reasonable service at reasonable rates, make such contracts unlawful as dealing with that which is primarily a matter of law, and not only beyond the scope of the doctrine of liberty of contract, and hence outside the class of legally enforceable obligations, but, *a fortiori*, without the protection of the contract clause or the due process clause of the federal or state constitutions.

FEDERAL REVIEW OF DECISIONS OF STATE COURTS INVOLVING FEDERAL QUESTIONS UNDER THE JUDICIAL CODE, § 237, AS AMENDED. — The extent to which the federal judiciary should control the state judiciary

Coast Electric Ry. Co. *v.* Board of Public Utility Commissioners, 104 Atl. (N. J. L.) 218, 220 (1918).

Of course, in order that the rates could be classed as unreasonable under the circumstances the prevailing conditions must be such as to substantially affect the ability of the utility to earn a fair return on its investment, and to maintain the necessary standard of service properly to fulfill its duty to the public, for the courts recognize the business fact that in such undertakings there is a certain extent of "missionary" effort required in order to build up the plant and introduce its product more widely; and again, the law does not undertake to guarantee even public service enterprises against any and all losses, since they should prepare to meet temporarily unfavorable conditions, and to render incidental services which may not in themselves be profitable. People of the State of New York *v.* McCall, 245 U. S. 345 (1917); Atlantic Coast Line R. R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1 (1907). *Cf.* Northern Pacific Ry. Co. *v.* State of North Dakota, 236 U. S. 585 (1915).

[26] See 32 HARV. L. REV. 74, 78.

[27] Interstate Commerce Commission *v.* Baltimore & Ohio R. Co., 145 U. S. 263 (1892).

[28] The power of the legislature to fix public utility rates is limited to reasonable rates. Chicago & Grand Trunk Ry. *v.* Wellman, 143 U. S. 339 (1892); Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 (1894); Smyth *v.* Ames, 169 U. S. 466, 526 (1898); Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578 (1896); San Diego Land and Town Co. *v.* National City, 174 U. S. 739 (1899).